85-1587

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DELORES AGEE, et al.,
Petitioners,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HIRAM WALKER & SONS, INC., a corporation and DISTILLERY WORKERS OF AMERICA, LOCAL 55,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN W. LYONS
JAMES E. SHADID
425 Credit Union Bldg.
207 Main Street
Peoria, Illinois 61602
(309) 676-1122

COUNSEL OF RECORD: RAYMOND C. ROSE
627 First Nat'l. Bk. Bldg.
Peoria, Illinois 61602
(309) 674-1452

Attorneys for Petitioners
DELORES AGEE, et al.

THE QUESTIONS PRESENTED FOR REVIEW

I. Does this consent decree regarding sex discrimination, reached without approval or conference with its beneficiaries, defeat the purpose of Title VII of the Civil Rights Act of 1964?

II. Does this consent decree regarding sex discrimination offer insignificant settlement awards and pension relief based on arbitrary and capricious criteria set out by the payor and the Equal Opportunity Commission?

LIST OF PARTIES

A. Delores Agee, Madeline Aiello, Edna Braten, Laura Bury, Neva Buttell, Helen Claver, Charolette Dickerson, Leslie Drummer, Gladys Dwyer, Marty Esbell, Margaret Evans, Pearl Fice, Nora Flynn, Rose Genusa, Annie Gibbons, Freda Goldsmith, Agnes Hall, Rose Harvey, Louisa Harvey, Virgil Hayes, Doris Hornung,

Harriet Hutton, Clara Jenkens, Mary Kaufmann, Mary Lafferty, Clara Maricle, Eleanor Marinich, Amelia Monroe, Emma Lou Moore, Ruth Osborn, Ann Pitcher, Julia Ross, Lavon Schuster, Margaret Thompson, Millie Wageman, Josephine Walker, Ann Williams, Grace Wort, Jessie Wright and Geneva Wytcherly.

B. Equal Employment Opportunity Commission

C. Hiram Walker & Sons, Inc., a corporation

D. Distillery Workers & America, Local 55

TABLE OF CONTENTS

Questions Presented for Review ii

List of Parties ii

Table of Contents iv

Table of Authorities v

Report of Opinions 1

Jurisdictional Statement 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 3

Argument I 9

Argument II 17

Conclusion 24

Appendix ..... Under Separate Cover

TABLE OF AUTHORITIES

Cases:	Page
Griggs v. Duke Power Company, 401 U.S. 424 (1971)	10
City of Los Angeles v. Manhart, 435 U.S. 702 (1978)	12

Constitution and Statutes:

If the court finds that the (employer) has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the (employer) from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. 42 U.S.C. 2000e-5(g), et seq.	2,4,10, 13,14

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1985

DELORES AGEE, et al.,

Petitioners,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HIRAM WALKER & SONS, INC., a corporation and DISTILLERY WORKER OF AMERICA, LOCAL 55,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

REPORTS OF OPINIONS

AGEE, et al. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al., _____ F2d _____(1985).

JURISDICTIONAL STATEMENT

(i) The United States District Court for the Central District of Illinois in Peoria entered its order on January 26, 1984.

(ii) The United States Court of Appeals for the Seventh Circuit entered its order following appeal on July 24, 1985.

(iii) The United States Court of Appeals for the Seventh Circuit denied a Motion to Reconsider on October 8, 1985.

(iv) 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq.

28 U.S.C. §1291

28 U.S.C. §1294

STATMENT OF THE CASE

This Title VII litigation is based on four individual and/or group charges. (1) In 1975, 123 charges were filed by individual women against Hiram Walker & Sons, Inc. (2) In 1975, charges were filed against Hiram Walker & Sons, Inc., on behalf of certain female employees and retirees by the National Organization for Women. (3) Charges were filed as to certain female employees and retirees by Local 55 against Hiram Walker & Sons, Inc. (4) In 1977, 113 additional charges were filed against Hiram Walker & Sons, Inc. and Local 55.

The 1975 charges allege that the company discriminated against female employees because of their sex with regard to pension benefits. In 1977, charges were filed by 113 women against both the company and the union. The 1977 charges

allege that the company and the local union discriminated against female employees because of their sex with regard to job assignment and job exclusion, transfer and promotion, lay-off, and certain benefits.

The Equal Employment Opportunity Commission (EEOC) commenced an investigation of these charges and in 1978 issued an administratively restricted decision which found reasonable cause to believe that all allegations of sex discrimination were true. After conciliation efforts were unsuccessful, the Commission filed suit on September 27, 1979 in the Northern District of Illinois alleging that the company and the union violated Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C., Section 2000(e) et seq., in the company's facilities in Peoria, Illinois by intentionally engaging

in unlawful employment practices which discriminated against female employees because of their sex. In January of 1983, the District Court for the Northern District of Illinois granted Hiram Walker's Motion for Change of Venue to the District Court for the Central District of Illinois in Peoria, Illinois.

Agreement as to all terms was reached between the EEOC and Hiram Walker in September of 1983. No person affected under the proposal was conferred with nor contacted, until preliminary court approval was acquired, as to criteria for recovery established by Hiram Walker and the EEOC. The criteria for recovery was described in the Hiram Walker trial brief: "(A)ny female hired prior to 1960 who tried on at least one occasion to perform work somewhere other than in the Bottling Line Division would receive two years

additional credited service for pension purposes, and that any female hired between 1960 and 1965 who tried to perform work in another Seniority Division on at least one occasion would receive one additional year of credited service." The Petitioners allege such criteria to be clearly arbitrary and capricious in its design and effect. The Court gave preliminary approval of the proposed consent decree on September 23, 1983, and directed notice to charging parties and other affected individuals, and set a hearing for December 22, 1983. A large number of women, including those intervening now, filed objections to the proposed consent decree. At the hearing on December 22, 1983, the Court heard oral arguments in favor of the decree by both the EEOC and Hiram Walker attorneys, and objections to the decree by all interested

parties to this suit as well as counsel on appeal.

At the close of the hearing, the Court requested the attorneys to submit briefs regarding the effect of the entry of the consent decree upon the rights of charging parties and others to further litigate against the defendants. The Court approved the consent decree on January 26, 1984 and allowed charging and non-charging parties who had formally filed objections to intervene in this cause.

The case was appealed to the Seventh Circuit Court of Appeals absent the conventional transcripts made at trial. A public hearing of sorts was held on December 22, 1983, regarding the proposed consent decree. All issues raised and argued are contained in the record by way of briefs and memoranda. No testimony was taken by the trial court throughout the

life of this cause.

Accordingly, the trial court's statement of the facts at the introduction of its Memorandum Opinion and Order filed January 26, 1984 (and attached as a part of the appendix herein) should be taken as an accurate depiction of the complaints made by Petitioners.

The Seventh Circuit Court of Appeals affirmed the Trial Court's decree on July 24, 1985, and denied a Petition for Rehearing on October 8, 1985.

ARGUMENT

I.

THIS CONSENT DECREE REGARDING SEX DISCRIMINATION, REACHED WITHOUT APPROVAL OR CONFERENCE WITH ITS BENEFICIARIES, DEFEATS THE PURPOSE OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

On page 30 of the District Court's opinion and order filed January 26, 1984, the Court stated "(I)ronically, most of those women who were charging parties and endured (from their point of view) discriminatory effects for many years end up with no relief under the decree. On the other hand, women who started working at Hiram Walkers in the 1970s and were subject to discrimination, if at all, for far fewer number of years, obtained proportionally greater relief under the decree." It is clear from the result of the decree that its makeup was one which

thwarted and defeated the purpose of Title VII of the Civil Rights Act of 1964.

The purpose of Title VII is to put the discriminated plaintiff in a place he would have been but for the discrimination. The plaintiff is entitled to all benefits he would have gotten had there not been a discriminatory act. Civil Rights Act, 1964, Section 701 et seq. as amended 42 U.S.C. 2000e et seq. The United States Supreme Court has stated the object of Title VII to be the removal of barriers that have operated in the past to favor an identifiable group of employees over other employees. Griggs v. Duke Power Company, 401 U.S. 424, 429-30 (1971).

This consent decree defies the purpose and plan of Title VII in that its approval would close out from recovery those who suffered the most discrimination. The

decree clearly awards recovery to the younger females who worked at Hiram Walker in the 1970s, and ignores females employed there for incredibly longer periods. the motive is apparent: should the ones who suffered the most discrimination be allowed to recover based on the discrimination they endured, Hiram Walker's pay out cost would be enormously higher than presently planned.

Further, the consent decree sets out names of 253 women believed affected by the "negotiated" settlement, with 177 of the 253 identified as actual charging parties to the action. However, the entire amount of pension relief afforded female employees by the decree is an additional two (2) years credited service for only eight women. Eight other women received an additional one year credited service for purposes of determing monthly

pension benefits from Hiram Walker.

A mere 16 women, of 253 affected, acquired additional work service time under this decree. Unsurprisingly, not one of the 16 was awarded time enough to permit them to accrue the required 30 years of service in order to receive a huge boost in monthly pension pay plus full hospitalization and insurance benefits, although the one or two years service given the 16 brought several within only months of the magic 30 year full pension requirement.

The EEOC and Hiram Walker proponets of the decree argue that pension relief is a form of back pay liability, and that a two year limit applies to such relief. In support of their position they cite City of Los Angeles v. Manhart, 435 US 702 (1978). However, the Court in Manhart addresses a completely different issue

than that in the case at bar. In Manhart, the key issue was whether females were entitled to recover monies they had previously paid into a pension fund at a higher rate than males due to their expected higher life expectancy. The Court stated it did not wish to injure innocent third parties by, in effect, ordering a "rebate". By contrast to the instant case, however, the Court did not state nor imply that women, or anyone for that matter, cannot now recover something which they have already purchased.

Additionally, it is important to review the language of Section 706B(5)(g) of Title VII of the Civil Rights Act of 1964 42 U.S.C., Sec. 2000e-5(g), which states:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in

> such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ...or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." (emphasis added)

Logic alone dictates that it would be ludicrous to limit pension relief to only a previous two year period. Clearly it would be no remedy to permit the victims of an employment discrimination to recover a maximum of two years credit toward a pension when such an award would nearly always be of no value. Rather, it would be a far more legitimate and equitable remedy for the court to award years of credited service toward pension for the number of years during which a discrimination existed. The quoted statute by its terms does not limit the availability of

back pay but, rather, limits the extent to which the singular remedy may be afforded in making whole the victims of discrimination. When measured against the broad "make whole" purposes of Title VII, it becomes evident that the two year cap on back pay contained in 42 U.S.C. §2000e-5(g) is not a statute of limitations.

The petitioners in the instant cause aver that voluntary conciliation and settlement may be the preferred means for resolving disputed issues but that it is not the necessary nor appropriate means to resolve allegations of this employment discrimination. Settlement merely for the sake of settlement is contrary to the true intentions of Congress and contrary to the purpose of Title VII. It is inappropriate to believe the demerits of protracted litigation somehow outweigh the interests

of the discriminated women to recover a just award.

II.

THIS CONSENT DECREE REGARDING SEX DESCRIMINATION OFFERS INSIGNIFICANT SETTLEMENT AWARDS AND PENSION RELIEF BASED ON ARBITRARY AND CAPRICIOUS CRITERIA SET OUT BY THE PAYOR COMPANY AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

The criteria for recovery under the decree's terms was described in the Hiram Walker trial brief as being "any female hired prior to 1960 who tried on at least one occasion to perform work somewhere other than in the Bottling Line Division would receive two years additional credited service for pension purposes, and that any female hired between 1960 and 1965 who tried to perform work in another Seniority Division on at least one occasion would receive one additional year of credited service."

To permit such a self serving criteria

to stand as a basis for settlement of this issue would be to permit Hiram Walker to profit from its own wrong in that the company itself deliberately and actively discouraged its female employees from accepting involuntary transfers. Women who had accepted an involuntary transfer in the 1960s and found themselves unable to physically comply with the job's demands or found only embarrassment and humiliation by their physical failures in the presence of jeering males were clearly discouraged from ever attempting to handle involuntary transfers in the future. Such a practice was not a consideration in establishing consent decree criteria even though it is well settled law that a primary purpose of Title VII award is to again make a person "whole" for injuries caused by illegal employment discrimination.

The consent decree provides stated payments to 82 named former Hiram Walker female employees, the total of these payments to be $165,600. The women selected to receive the lump sum payments were, according to the company, females who were initially assigned to the Bottling Line Seniority Division and who demonstrated by their use of transfers to other seniority divisions during the period 1975-81 that they might have both accepted an initial assignment to a seniority division other than the Bottling Line Division and successfully performed the work in another division. Each eligible employee "was given a certain amount for each year of eligibility," again according to the company. However, those women discouraged from involuntary transfers prior to 1975-81's "pertinent period" take nothing under the proposed decree although they

have clearly suffered the most discrimination the longest.

Furthermore, the facts reveal that it was understood among employees that failure to perform the involuntary transfer job could result in not just lay-off but dismissal. It is a grim notion to believe that the aforementioned criteria, established long after the proverbial game had been played, is anything but arbitrary. It should be clear to even the most ardent Hiram Walker supporter that the effect of the pension relief was calculated first, with the criteria for such relief to come much later. In short, the goal was to permit no one to recover their deserved 30 years of service not give anyone more than a token few more monthly dollars toward pension pay.

The Petitioners submit that Hiram Walker and the Equal Employment Opportunity

Commission had established a destiny for pension relief which under no circumstances would be significantly favorable to female company employees, regardless of equitability.

Criteria or no criteria, it cannot be disputed that many women who were in the same, or similar, positions as those included in the consent decree are simply left out. While examples are many, employees Ann Williams and Londia Wyatt typify a sample of the arbitrariness of the decree's criteria. Both women accepted transfers to the "rack house" for a period of four weeks in 1977. After that period Ann Williams refused to be subjected to the rack house work, which was recognized as physically troubling and dangerous for females. Londia Wyatt accepted two more short stints at the rack house. Under the decree, Ann Williams

receives nothing and Londia Wyatt receives $4,500.00.

In the case at bar, the largest recovery made by any female under the decree (and presumably the most deserving under the Hiram Walker/EEOC Criteria) is approximately $5,000. The total cost to Hiram Walker under this decree affecting in excess of 200 women for more than a generation is $200,000. Such a sum falls far short of reasonable compensatory amounts under the facts of this cause of action.

The Equal Employment Opportunity Commission states that "each (party) give(s) up something they might have won had they proceeded with the litigation." However, it is wrong to believe that compromise at any cost is victory. The injustice that would result from the arbitrary and subjective consent decree

will only encourage similar practices by companies in the future. No possible reason would exist for a corporate entity the size of Hiram Walker & Sons, Inc. to conform to the rigors of fair employment practices when discrimination as in the instant case is remedial by this sort of arbitrary remedy.

The Seventh Circuit Court of Appeals noted on pages nine and ten of its order that a District Court should be chary of disapproving a consent decree, and an appellate courts review of a decree is even more limited. We believe, however, that this Court of last resort is not so limited and may review a consent decree as it conforms, or does not conform, to constitutionally and statutorily protected rights and assurances.

Surely the female employees affected by the proposed consent decree deserve not

only a disposition free from arbitrary criteria that can be sensibly understood. The proposed decree must be rejected and returned to the District Court.

CONCLUSION

The Petitioners respectfully pray of this Honorable Court to reverse the order of the Seventh Circuit Court of Appeals and the District Court in approving the proposed consent decree and remand the cause for trial on the merits.

Respectfully submitted,

COUNSEL OF RECORD:

RAYMOND C. ROSE
Member of the Bar of the Supreme Court
627 First Nat'l. Bk. Bldg.
Peoria, Illinois 61602
(309) 674-1452

KEVIN W. LYONS
425 Credit Union Bldg.
207 Main Street
Peoria, Illinois 61602
(309) 676-1122

JAMES E. SHADID
627 First Nat'l. Bk. Bldg.
Peoria, Illinois 61602
(309) 676-0102

Attorneys for Petitioners,
DELORES AGEE, et al.